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Not Getting Hired Because you are Obese, but not Getting Fired Because you are Obese: How the New Changes to the ADA Have Set a Double Standard, and What’s to Prevent Companies From Trimming the Fat at the Office

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Introduction

Much attention has been devoted to providing the proper resources to disabled individuals to ensure that they have equal opportunities in employment. But most courts have had very little success in defining what being disabled actually means. Recent congressional amendments to the Americans with Disabilities Act ("ADAAA") have broadened the scope of the Act such that the Act now affords protections to individuals who were previously excluded. The recent amendments provide a chance to revisit how the courts have and will interpret what being disabled actually means.

Discrimination occurs in many forms during the employment process. While it is well known that employers can legally discriminate in selecting employees based on grades and

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2 See DISABILITY RIGHTS ADVOCATE, http://www.dralegal.org/ (last visited Sept. 29, 2011) ("DRA is a non-profit legal center dedicated to securing the civil rights of people with disabilities. DRA advocates for disability rights through high-impact litigation, as well as research and education."); see also DISABILITY RIGHTS ADVOCATE GROUP, http://www.draginc.com/ (last visited Sept. 29, 2011) ("The Philadelphia-based Disabilities Rights Advocacy Group Inc. (D.R.A.G.), has been a major lobbying force for curb cuts along City sidewalks, making Automated Teller Machines (ATMs) accessible."); NAT’L DISABILITY RIGHTS NETWORK, http://www.ndrn.org/ (last visited Sept. 29, 2011) ("NDRN has a vision of a society where people with disabilities have equality of opportunity and are able to participate fully in community life by exercising choice and self determination.").

3 See Spiegel v. Schulman, 604 F.3d 72, 83 (2d Cir. 2010) (dismissing claim so lower court could decide whether plaintiff’s obesity is a disability); see also 2nd Circuit Tells N.Y. Federal Court to Decide if Obesity is ‘Disability’, 23 WESTLAW J. EMP. 1, 1 (2010) ("The Philadelphia-based Disabilities Rights Advocacy Group Inc. (D.R.A.G.), has been a major lobbying force for curb cuts along City sidewalks, making Automated Teller Machines (ATMs) accessible."); NAT’L DISABILITY RIGHTS NETWORK, http://www.ndrn.org/ (last visited Sept. 29, 2011) ("NDRN has a vision of a society where people with disabilities have equality of opportunity and are able to participate fully in community life by exercising choice and self determination.").

4 See Cockrell v. United Parcel Service, Inc., No. 3:08-CV-0128-K, 2009 WL 2448571, at *4 (N.D. Tex. Aug. 10, 2009) ("Congress amended the portion of the ADA governing construction of the term ‘disability,’ such that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”).

5 See Cockrell v. United Parcel Service, Inc., No. 3:08-CV-0128-K, 2009 WL 2448571, at *4 (N.D. Tex. Aug. 10, 2009) ("Congress amended the portion of the ADA governing construction of the term ‘disability,’ such that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”).

6 See 2nd Circuit Tells N.Y. Federal Court to Decide if Obesity is ‘Disability’, supra note 3, at 1.

7 See infra Part IV.A–C.
education, employers cannot discriminate based on race or gender.\textsuperscript{8} However, are some employers discriminating based on an applicants’ weight?\textsuperscript{9} When applicants are not extended a callback or an offer, employers rarely give any reasons why.\textsuperscript{10} What if the reason was that the applicant was too fat?\textsuperscript{11} Unemployment lines seem to be getting longer as each month goes by.\textsuperscript{12} As the unemployment rate keeps rising, more and more qualified workers are entering the workforce.\textsuperscript{13} This leaves employers with a larger pool of qualified applicants from which to choose.\textsuperscript{14} In the scramble to select the right candidate for the job, employers look for any reason not to hire someone.\textsuperscript{15} Why not begin by eliminating all the candidates who are fat?\textsuperscript{16} A recent research study has shown that obesity costs employers $73.1 billion a year.\textsuperscript{17}

\textsuperscript{8} 42 U.S.C. § 2000e-2 (2006) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”).

\textsuperscript{9} See infra Part III.B–C.


\textsuperscript{11} See infra Part IV.A.

\textsuperscript{12} See Senator Mitch McConnell, Americans Aren’t Amused by Worsening Economy (June 15, 2011), http://mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=105bc38d-cf6-448c-bd99fa35f18769b&ContentType_id=19bc7a5-2bb9-4a73-b2ab-3cb191a72b&Group_id=0fd6dca-6a05-4b26-8710-0e7b59a8f1 (“The day the President took the oath of office, 12 million Americans were out of work. Today, nearly 14 million Americans are out of work. That’s a 17% increase in the unemployment rate under President Obama. So unemployment’s worse.”).

\textsuperscript{13} See id.

\textsuperscript{14} See Kayleigh Kulp, Seven Ways to Ruin Your Resume, FOX BUSINESS (Sept. 20, 2011), http://www.foxbusiness.com/personal-finance/2011/09/20/seven-ways-to-ruin-your-resume/ (“The country’s high unemployment rate means employers have a larger and more-qualified applicant pool to choose from than five years ago.”).

\textsuperscript{15} See Jenna Wortham, More Employers Use Social Networks to Check Out Applicants, THE N.Y. TIMES BITS BLOG (Aug. 20, 2009), http://bits.blogs.nytimes.com/2009/08/20/more-employers-use-social-networks-to-check-out-applicants/; cf. Jane Korn, Too Fat, 17 VA. J. SOC. POL’Y & L. 209, 225 (“[F]at people have a harder time getting a job. Between equally qualified candidates, the overweight applicant will be perceived as being less qualified, having poorer work habits, and as more likely to be absent.”).

\textsuperscript{16} See SAMUEL KLEIN ET AL., AGA TECHNICAL REVIEW ON OBESITY, 123 GASTROENTEROLOGY 882, 893 (2002). There is a potential to create unwanted tension in the workplace if an employer hires an individual who happens to be obese. \textit{Id.} More than likely, the obese employee will have a higher rate of sick days and an increased likelihood of filing a disability claim against the employer than the average worker. \textit{Id.}

employers money in the long run.\textsuperscript{18} The question then becomes, can employers actually get away with this?\textsuperscript{19} Since the ADAAA has broadened the scope of what a disability is,\textsuperscript{20} individuals who are obese may now be covered.\textsuperscript{21} This in turn might leave employers open to lawsuits and unable to exclude the obese from the workforce.\textsuperscript{22}

This article examines how the recent amendments to the Americans with Disabilities Act fail to afford people who are classified as obese the protection against employment discrimination they deserve.\textsuperscript{23} Part I outlines the development of the history of protections afforded to individuals who are disabled.\textsuperscript{24} Part II concentrates on obesity as a medical condition and the way in which society perceives those who are obese.\textsuperscript{25} Part III focuses on whether or not obesity can be classified as a disability under the ADAAA.\textsuperscript{26} Part IV provides a pragmatic solution, which identifies safeguards for an obese person at each level of the employment process in order to prevent him or her from becoming a victim of discrimination.\textsuperscript{27}

\footnotesize
\begin{itemize}
  \item \textsuperscript{18} See \textit{id.}; Kathryn Hinton, \textit{Note, Employer by Name, Insurer by Trade: Society's Obesity Epidemic and its Effects on Employers’ HealthCare Costs,} 12 \textit{CONN. INS. L.J.} 137, 144 (2005) (implying that the easiest way for employers to cut healthcare costs, is to fire or refuse to hire obese employees).
  \item \textsuperscript{20} See 42 U.S.C. § 12102(4)(A) (Supp. III 2009) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”).
  \item \textsuperscript{21} See, e.g., Lowe v. American Eurocopter LLC., No. 1:10CV24-A-D, at *6 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010) (finding that obese plaintiff has plausibly alleged that she is disabled).
  \item \textsuperscript{22} See \textit{BARBARA K. REPA, FIRING WITHOUT FEAR: A LEGAL GUIDE FOR CONSCIENTIOUS EMPLOYERS} 67 (Ralph Warner eds., 2000). It is not uncommon for some newly fired employees to be angry and hurt even if they are completely in the wrong. \textit{Id}. Also take into consideration that they have a lot of free time on their hands and you might have the recipe for a lawsuit. \textit{Id.} While most lawyers will refuse to take such a frivolous lawsuit where an employee is concerned with revenge instead of the facts, there are some lawyers who, for lack of better judgment, might decide to take such a case to court. \textit{Id.}
  \item \textsuperscript{23} See \textit{infra} Part I.A–C.
  \item \textsuperscript{24} See \textit{infra} Part I.A–C.
  \item \textsuperscript{25} See \textit{infra} Part II.A–B.
  \item \textsuperscript{26} See \textit{infra} Part III.A–C.
  \item \textsuperscript{27} See \textit{infra} Part IV.A–C.
\end{itemize}
I. The Road Traveled to Arrive at the Current Protections for Disabled Americans

Anti-discrimination laws, such as the Rehabilitation Act of 1973\textsuperscript{28} and the Americans with Disabilities Act of 1990,\textsuperscript{29} grew out of the disability rights movement and have a central belief that is both simple and profound.\textsuperscript{30} That belief is that people who are labeled “disabled” must be treated equally with people who are not disabled.\textsuperscript{31}

A. The Rehabilitation Act of 1973

In 1973, Congress passed the Rehabilitation Act with the goal of increasing employment for individuals with disabilities.\textsuperscript{32} The Rehabilitation Act of 1973 was founded on the same principles of the Civil Rights Act of 1964, affording protection to individuals that are the victims of discrimination.\textsuperscript{33} This was the first protection of its kind offered to individuals with disabilities\textsuperscript{34} and was just the beginning in affording these individuals the same rights as other nondisabled American citizens.\textsuperscript{35} While the Rehabilitation Act of 1973 advanced the rights of

\textsuperscript{31} See id. at 415.
\textsuperscript{32} 29 U.S.C. § 701.
\textsuperscript{33} Melanie D. Winegar, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1269 (2006) (explaining how the Rehabilitation Act of 1973 was modeled after the Civil Rights Act of 1964 which is why the new protections given to the disabled were so similar to the ones that were given to individuals who had been discriminated against based solely on their race or sex); see also Robert L. Burgdorf Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 429–32 (1991) (arguing that the only difference between the Rehabilitation Act of 1973 and the Civil Rights Act of 1964 is the phrase handicapped and otherwise both Acts are essentially the same).
\textsuperscript{34} See *Section 504 of the Rehabilitation Act of 1973, Disability Rights Educ. & Def. Fund*, http://www.dredf.org/504/index.shtml (last visited Aug. 28, 2011) (insinuating that the Rehabilitation Act of 1973 was the first disability civil rights law to be enacted in the United States thus setting the stage for the enactment of the Americans with Disabilities Act).
\textsuperscript{35} See 29 U.S.C. § 701; see also Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (7th Cir. 1977) (holding the principal purpose of the 1974 amendments to the Rehabilitation Act of 1973 was to include within the scope the
individuals with disabilities, it fell short in regards to one major area. The Act only protected federal employees and employees who worked for an institution that received some sort of federal aid. The Rehabilitation Act failed to broaden the scope of coverage provided by the Civil Rights Act to include any individual employed by an entity other than the United States Government. It was not until the passage of the Americans with Disabilities Act of 1990 ("ADA") that the same protection was afforded to all persons who suffer from a disability.

B. The Americans with Disabilities Act of 1990

When President Ronald Regan took office, he noticed that the Rehabilitation Act of 1973 was ineffective in its primary purpose of providing equal rights to the disabled. Reagan appointed Vice-President Bush to head the Regulatory Relief Task Force, which was charged with the task of cutting away irrational and senseless regulations. Vice-President Bush turned

37 Id. ("No otherwise qualified individual with a disability . . . shall be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").
38 See id.; see, e.g., Prewitt v. United Postal Serv., 662 F.2d 292, 301 (5th Cir. 1981) (explaining that the Rehabilitation Act of 1973 established the principle that the federal government and recipients of federal funds cannot discriminate against the handicapped).
39 See Saunders v. Horn, 960 F. Supp. 893, 897 (E.D. Pa. 1997) (holding the Americans with Disabilities Act shares a common nucleus with the Rehabilitation Act of 1973 as both prohibit specific kinds of institutions from discriminating against individuals on the basis of disability); Coleman v. Zatechka, 824 F. Supp. 1360, 1367 (D. Neb. 1993) ("Although Americans with Disabilities Act provides persons with disabilities with same rights and remedies as provided under Rehabilitation Act, ADA is not limited to programs receiving federal funding, but rather applies to all public entities."). See generally 42 U.S.C. § 12111(5) (2006) ("The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."); 42 U.S.C. § 12111(4) (2006) ("The term 'employee' means an individual employed by an employer.").
40 See Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 1986 U.S.C.C.A.N. (99 Stat.) 3554. Explaining that Rehabilitation Act Amendments of 1986 were needed to further the rights of the handicapped. Id. It was signed with the purpose of subjecting states, as a condition to their receiving federal assistance to suits for violating the federal laws that prohibit discrimination on the basis of handicap, race, age or sex to the same extent as a private or public company. Id.
41 See generally Winegar, supra note 33, at 1268–72 (discussing the history of how the Americans with Disabilities Act came about); Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief, THE
to the newly formed National Council of the Handicapped to conjure up a solution.\textsuperscript{42} The National Council of the Handicapped recommended that Congress pass a new law exclusively for providing equal opportunity for people with disabilities.\textsuperscript{43} These recommendations ended up paving the way for the creation of the ADA.\textsuperscript{44} “The Americans with Disabilities Act represents the full flowering of our democratic principles.”\textsuperscript{45} The ADA was enacted in 1990 to eliminate all forms of discrimination against people with mental and physical disabilities.\textsuperscript{46} Congress found that around 43,000,000 Americans suffer from one or more physical or mental disabilities.\textsuperscript{47} Accordingly, the ADA was passed with the intent to take an overdue, but extremely necessary step to fully welcome these 43,000,000 individuals into the mainstream of American society.\textsuperscript{48} Congress enlisted the federal government to play a vital role in enforcing these new standards set forth by the ADA.\textsuperscript{49}
Congress had no choice but to act because the isolation and discrimination imposed by society upon individuals with disabilities was increasingly getting worse.\textsuperscript{50} As time passed from the ADA’s enactment, it became clear that Congress might have missed the mark in what it thought was a solution to this increasing problem.\textsuperscript{51}

C. The ADA Amendments Act of 2008

The holdings in two landmark United States Supreme Court cases caught the attention of Congress and alerted it to the fact that the ADA was not living up to its potential.\textsuperscript{52} Congress believed that the holdings in these two cases had strayed far from legislative intent\textsuperscript{53} and therefore it overruled these two decisions in the amendments to the ADA.\textsuperscript{54}

The decision in \textit{Sutton v. United Air Lines Inc.},\textsuperscript{55} alerted Congress that courts were not interpreting the ADA in the way Congress intended, thus, Congress realized it unavoidably had to make substantive changes.\textsuperscript{56} In \textit{Sutton}, the Supreme Court Court held that corrective and power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

\textit{Id.}  
\textsuperscript{50} See 42 U.S.C. § 12101(A)(2) (“Historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”).

\textsuperscript{51} See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553; see also Burgdorf Jr., \textit{supra} note 33, at 522 (concluding that there are to many exemptions and exceptions in the ADA for it to ever live up to its full potential of being able to protect the disabled from all kinds of discrimination).

\textsuperscript{52} See ADA Amendments Act of 2008 § 2.

\textsuperscript{53} See id.; H.R. REP. No. 110-730, pt. 1, at 2 (2008) (explaining that the Supreme Court has narrowed the broad scope of protection intended to be afforded by the ADA).

\textsuperscript{54} See ADA Amendments Act of 2008 § 2; Paul R. Klein, Note, \textit{The ADA Amendments Act of 2008: The Pendulum Swings Back}, 60 CASE W. RES. L. REV. 467, 475 n.77 (2010) (stating that the Supreme Court’s interpretation of the ADA exhibited how the ADA has failed to protect the disabled, thus forcing Congress to respond).

\textsuperscript{55} 527 U.S. 471, 482 (1999).

\textsuperscript{56} See ADA Amendments Act of 2008 § 2; Toyota Motor Mfg., Ky., v. Williams, 534 U.S. 184, 197 (2002) (holding that the ADA needs to be interpreted strictly when deciding whether or not an individual is disabled, and that an individual must have an impairment that prevents or severely restricts the individual from participating in activities that are of central importance to most people’s daily lives to afforded the protections of the ADA); Sutton v. United Air Lines, Inc., 527 U.S. 471, 471 (1999) (holding that to decide if an impairment substantially limits a major life activity, ameliorative effects of mitigating measures must be taken into consideration); see also Kate S. Arduini, Note, \textit{Why the Americans With Disabilities Act Amendments Act is Destined to Fail: Lack of Protection for the “Truly” Disabled, Impracticability of Employer Compliance, and the Negative Impact it Will Have on our Already Struggling Economy}, 2 DREXEL L. REV. 161, 172 (explaining that congress passed the ADAAA with the intention of
mitigating measures should be considered in determining whether the individual is substantially limited in a major life activity, and thus disabled. The Court misinterpreted the original intention of the ADA and concluded that the ADA did not exist to protect people who had accommodations for their disabilities, but rather, it was for the protection of people whose disabilities could not be accommodated. Congress’s intent was to not only provide protection to those whose disabilities could not be overcome, but also to protect all people who suffered from a disability, temporary or permanent. Congress believed no amount of accommodations could eradicate the social stigma that being disabled carries with it.

The case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams further impressed upon Congress that courts were misinterpreting the ADA contrary to congressional intent. In Toyota, the burden of proof required to show that a disability substantially limited one’s life was

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Restoring congresses intent to provide adequate protection for the disabled. In enacting the amendments, Congress found that,

[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect . . . [t]he holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA.

ADA Amendments Act of 2008 § 2.

ADA Amendments Act of 2008 § 3 (concluding that an impairment substantially limits a major life activity regardless if it can be accommodated). Contra 527 U.S. 471, 482 (1999) (explaining that severely myopic applicants were denied positions as global airline pilots because of their failure to pass the airline’s visual requirement test, applicants then brought suit under the ADA where the Supreme Court held applicants were not disabled because applicants could do something about their visual impairment by wearing corrective lenses).

See 527 U.S. at 482 (holding applicants were not disabled because applicants could do something about their visual impairment).

See generally id. (stating that being disabled is stigmatizing and can lead to discrimination).

See id.; ADA Amendments Act of 2008 § 2 (“[I]n particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress.”).
so high that the many people who were originally intended to benefit from the passing of the ADA could no longer seek its protection.64

It was clear to Congress that something was wrong, and in a study done by the American Bar Association it was determined that in over ninety percent of the cases brought under the ADA, the employer had received a favorable verdict.65 Congress looked to new legislation to try and recapture the original intention of the ADA.66 The ADA Amendments Act of 2008 became effective on January 1, 2009.67 Besides overruling numerous Supreme Court cases, the ADAAA set out to provide a clear definition of what it means to be disabled.68 Individuals can be classified as disabled if they have a physical or mental impairment that substantially limits one or more major life activities, have a record of such an impairment, or are regarded as having such an impairment.69 The ADAAA expanded the scope so that the word disability could be broadly interpreted to provide the maximum coverage for any individual who is disabled.70

The ADAAA states that, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and

64 See ADA Amendments Act of 2008 § 2; Toyota Motor Mfg., Ky., 534 U.S. at 184 (holding that “substantially limited” under the ADA should be interpreted to mean that the individual is substantially limited in performing a major life activity which prevents or restricts the individual from doing activities that are central to one’s life).
65 Ameila Michele Joiner, The ADAAA: Opening The Flood Gates, 47 SAN DIEGO L. REV. 331, 358 (2010) (“The American Bar Association determined that during the 1990s employers prevailed in 91.6% of cases brought under the ADA.”).
67 See ADA Amendments Act of 2008 § 1.
68 See id.
69 See 42 U.S.C. § 12102(1).
70 See id. § 12102(4)(A); Id. § 12102(4)(D) (“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”); see, e.g., Fournier v. Payco Foods Corp., 611 F. Supp. 2d 120, 129 (D.P.R. 2009) (holding that the main purpose of the Amendments to the ADA is to reinstate the vast scope of protection that was once available under the ADA). But see Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 520–21 (1999) (holding that under Sutton a plaintiff who had hypertension for which he took medication was not substantially limited in any of his major life activities thus failing to fall under the classification of disabled); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (narrowing the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect).
working.” The ADAAA further expanded protection to individuals who are perceived to be disabled but do not actually suffer from any disability. An individual just needs to be perceived as being disabled, and treated as such, to gain the protection of the ADAAA.

When President Bush signed the ADA in 1990, he expressly stated that there was no need to fear that the ADA would be too vague and any such fears were misplaced. It turned out those fears were not misplaced. Congress enacted the ADAAA to “restore the intent and protections of the Americans with Disabilities Act of 1990.” Several interpretations of the term “disabled” by courts were believed to be inconsistent with the original intent of the ADA. Congress specifically addressed the issue and provided a more clear definition of what a disability is.

II. The Stigma of Being Obese

Stupid, disgusting, lazy; these are all words society commonly uses to describe persons suffering from obesity. Does that sound familiar? Historically, the same stereotypes have been used to describe African Americans and to some extent those stereotypes are still used today. The United States Government has taken numerous actions to try and end racism in an effort to

71 ADA Amendments Act of 2008 § 3.
72 See id.
73 See id.
75 ADA Amendments Act of 2008 § 1; see Rohr v. Salt River Project Agric. Improvmt. and Power Dist., 555 F.3d 850, 860–61 (9th Cir. 2009) (“On September 25, 2008, two months after the parties’ oral argument before this court, President George W. Bush signed into law the ADAAA, which significantly expands the scope of the term ‘disability’ under the ADA.”).
76 See ADA Amendments Act of 2008 § 1.
77 See id. The law which Congress proposed cited several Supreme Court cases which Congress believed restricted the interpretation of what a disability is. Id.
78 See generally Mark Roehling, Studies Refute Common Stereotypes About Obese Workers, MICH. STATE UNIV. (July 18, 2008), http://news.msu.edu/story/5608/ (“Previous research has demonstrated that many employers hold negative stereotypes about obese workers, and those beliefs contribute to discrimination against overweight workers at virtually every stage of the employment process, from hiring to promotion to firing.”).
79 See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1078 (3d Cir. 1996) (finding that employees using verbal insults and demeaning language, including referring to black employees as, “another one,” “one of them,” and “poor people” was sufficient for a jury to find the existence of a racially hostile environment).
level the playing field and enforce equal protection of the laws.\textsuperscript{80} It is time for Congress to take a pragmatic approach and ensure these same protections for the obese.\textsuperscript{81}

A. Why are Some People Obese?

Obesity is a complex, chronic disease described as the excessive accumulation of body fat.\textsuperscript{82} Obesity can be the result of many different individual factors, but it is usually the result of a combination of factors that contribute to excess body fat.\textsuperscript{83} Many different theories exist for why some people cannot control the weight they gain.\textsuperscript{84} Ultimately, the formula for obesity often boils down to taking in more calories than one expends.\textsuperscript{85}

The National Institute of Health classifies obesity in adults according to the Body Mass Index ("BMI").\textsuperscript{86} "BMI provides a reliable indicator of body fatness for most people and is used

\textsuperscript{80} See Slaughter-House Cases, 83 U.S. 36, 91–92 (1872) ("This legislation was supported upon the theory that citizens of the United States . . . were entitled to the rights and privileges enumerated, and that to deny to any . . . citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary servitude."); see also Civil Rights Act of 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (102 Stat.) 768. President Bush Upon signing declared:

Since the Civil Rights Act was enacted in 1964, our Nation has made great progress toward the elimination of employment discrimination. I hope and expect that this legislation will carry that progress further. Even if such discrimination were totally eliminated, however, we would not have done enough to advance the American dream of equal opportunity for all. Achieving that dream will require bold action to reform our educational system, reclaim our inner cities from violence and drugs, stimulate job creation and economic growth, and nurture the American genius for voluntary community service. My Administration is strongly committed to action in all these areas, and I look forward to continuing the effort we celebrate here today.

\textit{Id.}

\textsuperscript{81} See infra Part IV.A–D (discussing solutions as to how the government can afford protection to those who suffer from obesity).


\textsuperscript{83} See \textit{What are Overweight and Obesity?}, NAT’L HEART BLOOD AND LUNG INST., http://www.nhlbi.nih.gov/health/health-topics/topics/obe/ (last visited Oct. 12, 2010) (explaining excessive weight gain can be the result of many factors, these factors include environment, family history, genetics, metabolism behavior or habits, and more).

\textsuperscript{84} See Elizabeth Kolbert, \textit{Why are we so Fat?}, \textit{THE NEW YORKER} (Jul. 20, 2009), http://www.newyorker.com/arts/critics/books/2009/07/20/090720crbo_books_kolbert?currentPage=all (listing all the different theories why we over eat such as, evolution and conditioning); see also \textit{Nutrition: Why Fat People Keep Eating?}, \textit{TIME MAGAZINE} U.S. (Jul 24, 1964), http://www.time.com/time/magazine/article/0,9171,939038,00.html.


\textsuperscript{86} See \textit{What are Overweight and Obesity?}, supra note 83.
to screen for weight categories that may lead to health problems." One way to calculate a person’s BMI is to take the ratio of his or her weight in kilograms to the square of his or her height in meters. For adults, a BMI of 25–29.9 is classified as overweight, and a BMI of 30.0 or above is classified as obese. This is not just a problem that affects a small portion of our country. About one-third of U.S. adults are obese. Of that one-third, roughly six percent are morbidly obese. The difference between obese and morbidly obese is more than just a few pounds. Once an individual crosses over that line and becomes morbidly obese, he or she will face many more obstacles in life.

B. What is the Problem With Carrying the Extra Weight?

Racism is regarded as a pattern of thinking or a perception held by members of a dominant group, which characterize members of a minority group as inferior on the basis of a

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90 See Jennifer S. Haas et al., The Association of Race, Socioeconomic Status, and Health Insurance Status with the Prevalence of Overweight Among Children and Adolescents, 93 AM. J. PUB. HEALTH 2105, 2105 (2003). According to a recent study by the Center for Disease Control, fourteen percent of children and twelve percent of adolescents are overweight. Id. These numbers are cause for concern, overweight children and adolescents are more likely to be overweight in adulthood. Id.
91 Cynthia L. Ogden & Margaret D. Carroll, Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults: United States, Trends 1960–1962 Through 2007–2008, CDC (June 2010), http://www.cdc.gov/NCHS/data/hestat/obesity_adult_07_08/obesity_adult_07_08.pdf; see also Maggie Fox, Obese Americans now outweigh the merely overweight, REUTERS.COM (Jan 9, 2009), http://www.reuters.com/article/2009/01/09/us-obesity-usa-idUSTRE50863H20090109 (“Numbers posted by the National Center for Health Statistics show that more than 34 percent of Americans are obese, compared to 32.7 percent who are overweight. It said just under 6 percent are extremely obese.’”).
93 See Hobbs v. Asture 627 F. Supp. 2d 719, 726 (W.D. La. 2009); see also THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (Robert Berkow et al. eds., 16th ed. 1992) (explaining that an individual is morbidly obese when he or she weighs more than one hundred percent of his or her normal body weight).
94 See Emily Friedman, Obese Face Obstacles In Adoption Process, ABCNEWS.COM (JULY 31, 2007), http://abcnews.go.com/Health/story?id=3429655&page=1; Kelley M. Blassingame, Employers, Government Fight to Curb Obesity Epidemic, EMP. BENEFIT NEWS, Aug. 2003, at 37. A family court in Missouri just ruled a 500 pound man unfit to adopt because of his weight. Friedman, supra. Obesity claims a person’s life every ninety seconds, that adds up to about 300,000 lives annually. Blassingame, supra, at 37. Additionally, obesity can shorten an individual’s lifespan by twenty years. Id.
real or imagined physical characteristic. Racism leads to the legitimatization of inferior treatment, exclusion, and ultimately the exploitation of members of the minority group. Being obese put individuals in a minority group that is more likely to receive inferior treatment, exclusion and exploitation. Besides living in a society where being obese carries with it a negative connotation, there are several health risks associated with obesity. The question to consider is whether employers look at not only the stigma, but also the health risks and equate them with financial costs such as: sick leave, health care, accommodations in work tasks and environment, and so on.

III. Where Obesity Fits Under the ADAAA

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96 See Appelt, supra note 95. Which defines racial discrimination as:

Any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Id.

97 See Appelt, supra note 95; Bob LaMendola, Some Ob-gyns in South Florida Turn Away Overweight Women, SUNSENTINEL.COM (May 16, 2011), http://articles.sun-sentinel.com/2011-05-16/health/fl-hk-no-obesity-doc-20110516_1_gyn-ob-gyn-obese-patients (“Fifteen obstetrics-gynecology practices out of 105 polled by the Sun Sentinel said they have set weight cut-offs for new patients starting at 200 pounds or based on measures of obesity — and turn down women who are heavier.”).

98 See Elizabeth Theran, “Free to be Arbitrary and . . . Capricious:” Weight-based Discrimination and the Logic of American Antidiscrimination Law, 11 CORNELL J.L. & PUB. POL’Y 113, 157 (2001). Employers sometimes view obese employees or applicants as having no self-control. Id. Employers perceive these individuals have made the choice to become overweight. Id.

99 See Health Consequences, CTR. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/causes/health.html (last updated Mar 3, 2011). Research has shown that as weight increases to reach the levels referred to as obese, the risks for the following conditions also increase: coronary heart disease, type 2 diabetes, cancer, hypertension, dyslipidemia, stroke, liver and gallbladder disease, sleep apnea, respiratory problems, and gynecological problems. Id.

100 See Klein, supra note 16, at 893. There is a potential to create unwanted tension in the workplace if an employer hires an individual who happens to be obese. Id. More than likely the obese employee will have a higher rate of sick days and an increased likely hood of filing a disability claim against the employer than the average worker. Id.
The ADAAA does not specifically declare obesity as a disability.101 This has presently left courts grasping for anything that would give them a definitive answer as to whether obesity is a disability or not.102 Since the ADAAA was only recently enacted in 2008, not many cases have been decided in accordance to the new guidelines the amendments set forth103 to give broad protection to those who suffer from a disability such as obesity.104 Most claims of employment discrimination, in which the plaintiff’s case is based solely on the claim that they were mistreated due to their obesity, occurred before the ADAAA was enacted.105 Even if a case had been filed after the ADAAA was enacted, courts have held that the ADAAA cannot be applied retroactively.106 Therefore, if an employee was discriminated against for being obese prior to

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101 See 42 U.S.C. § 12102 (Supp. III 2009). See generally Lowe v. American Eurocopter, LLC., No. 1:10CV24-A-D, 2010 WL 5232523, at *6 (N.D. Miss. Dec. 16, 2010) (explaining that the Court is unable to say that obesity can never be a disability under the ADA, especially given that on September 25, 2008, the ADA was amended by the Americans with Disabilities Act Amendments Act of 2008); Melson v. Chetofield, No. 08-3683, 2009 WL 537457, at *3 (E.D.La. Mar. 4, 2009) (“Prior to the ADAAA, the Interpretive Guidance created by the EEOC on Title I of the ADA provided that except in ‘rare circumstances,’ obesity is not considered a disabling impairment.”).

102 See 2nd Circuit Tells N.Y. Federal Court to Decide if Obesity is ‘Disability’, supra note 3, at 1 (“The 2nd U.S. Circuit Court of Appeals has remanded a wrongful-termination case brought by two karate instructors for the lower court to decide if obesity is a disability under New York City anti-discrimination law.”).

103 See Lowe v. American Eurocopter, LLC., No. 1:10CV24-A-D, 2010 WL 5232523, at *6 (N.D. Miss. Dec. 16, 2010) (explaining that most cases deciding whether obesity is a disability or not were all decided before the ADAAA took effect, the ADAAA has since expanded the definition of what substantially limits, and what constitutes a major life activity).


In the ADA Amendments Act, Congress made clear that it intends for the ADA to give broad protection to persons with disabilities Congress amended the portion of the ADA governing construction of the term ‘disability,’ such that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act” and “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the [Act].”

105 See Carmona v. Southwest Airlines Co., 604 F.3d 848, 856 (5th Cir. 2010) (stating that the ADAAA does not apply retroactively); Becerril v. Pima County Assessor’s Office, 587 F.3d 1162, 1164 (9th Cir. 2009) (holding congress did not intend for the ADAAA to be applied retroactively); E.E.O.C. v. O’Reilly Auto. Inc., 555 F.3d 462, 469 n.8 (5th Cir. 2009) (referring to the fact that the discrimination occurred before 2009, thus case law prior to the enactment of the ADAAA will be followed).

106 See Cockrell v. United Parcel Service, Inc., (Ohio), No. 3:08-CV-0128-K, 2009 WL 2448571, at *4 (N.D. Tex. Aug. 10, 2009) (“Plaintiff argues that the ADA Amendments Act of 2008, which became effective on January 1, 2009, broadens the scope of the ADA and allows the Court to utilize a broader conception of ‘disability.’ The Court finds, however, the amendments do not apply retroactively to govern conduct occurring before 2009.”).
2009, courts govern according to established case law that has interpreted the guidelines set forth in the ADA, not the ADAAA.\textsuperscript{107}

A. Three Prong Approach to Disability

There are three ways a person can be classified as being disabled under the ADAAA.\textsuperscript{108} This is called the three-prong approach,\textsuperscript{109} and an individual only needs to fall under one of the prongs to avail themselves of the benefits given by the ADAAA.\textsuperscript{110} The first prong states that a person is considered disabled if he or she has a physical or mental impairment that substantially limits one or more major life activity; it is the most difficult prong for a person to meet who is claiming that his or her obesity is a disability.\textsuperscript{111} A major life activity refers only to those activities that are of central importance to daily life.\textsuperscript{112} Recognized major life activities include functions such as caring for one’s self, walking, seeing, hearing, speaking, breathing, learning, working and performing other various manual tasks.\textsuperscript{113}

The second way a person can qualify as having a disability is if he or she has a record of such an impairment.\textsuperscript{114} This broadens the scope of coverage to include those who previously had

\textsuperscript{107} See \textit{id}.
\textsuperscript{108} 42 U.S.C. § 12102(1) (Supp. III 2009) (“The term ‘disability’ means, with respect to an individual: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”); see also E.E.O.C. v. Chevron Phillips Chemical Co., 570 F.3d 606, 614 (5th Cir. 2009) (citing to the ADA’s interpretation of what constitutes a disability); Ryan v. Grae & Rybicki, P.C., 135 F.3d 867, 870 (2nd Cir. 1998) (deferring to interpretation provided by the ADA as to what constitutes a disability).
\textsuperscript{109} See Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 381 (3d Cir. 2002) (explaining that the Americans with Disabilities Act provides a three prong definition of disability).
\textsuperscript{110} See Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998) (“An individual must meet one of these three prongs in order to be covered under the ADA.”).
\textsuperscript{111} See 42 U.S.C. § 12102(1)(A).
\textsuperscript{112} See Desmond v. Mukasey, 530 F.3d 944, 953 (D.C. Cir. 2008).
\textsuperscript{114} See Eshelman v. Agere Sys., Inc., 554 F.3d 426, 436–37 (3d Cir. 2009) (“Congress included ‘record of’ disability claims in the Americans with Disabilities Act (ADA) to ensure that employees could not be subjected to discrimination because of a recorded history of disability.”).
a disability, as well as those who never really had such a condition, but were mistakenly listed or described in someone’s records as having had a disability.\textsuperscript{115}

The third and final way an individual can be classified as having a disability is if they are regarded as having such an impairment.\textsuperscript{116} This third prong broadened the scope of protection so wide that anyone who claims that he or she has been regarded as having a disability can seek the protection of the ADAAA.\textsuperscript{117} “An individual is ‘regarded as having an impairment’ when he demonstrates that the employer engaged in discrimination based on an impairment, regardless of whether the employer perceives that this impairment actually limits a major life activity.”\textsuperscript{118} Therefore, if an individual is perceived as limited because of his weight, that person might be able to satisfy the Act’s requirements, even if obesity or simply being overweight is not expressly stated as an impairment under the Act.\textsuperscript{119}

Under the ADAAA, an individual no longer has the burden to prove that the disability he or she is regarded as having is a recognized disability under the ADA or that it substantially limits a major life activity.\textsuperscript{120} “The ADAAA requires a plaintiff to only show that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”\textsuperscript{121} This opens the door to the possibility that an obese plaintiff might be

\begin{footnotes}
\item[115] See id. at 437.
\item[116] See 42 U.S.C. § 12102(1)(C) (“An individual meets the requirement of being ‘regarded as’ . . . if . . . he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”).
\item[117] See id.
\item[120] Lowe v. American Eurocopter LLC., No. 1:10CV24-A-D, 2010 WL 5232523, at *7 (N.D. Miss. Dec. 16, 2010) (emphasizing that the ADAAA expanded on the ADA since previous courts held plaintiffs proving a disability to a higher than intended standard).
\item[121] Id. at *7.
\end{footnotes}
considered disabled under the ADA as long as his or her weight is perceived by an employer to be an impairment.\textsuperscript{122}

**B. Cases Interpreting Disability Laws In A Way To Protect Those Who Are Obese**

One of the most well known cases involving obesity and disability law is *Cook v. Rhode Island Department of Mental Health, Retardation, & Hospitals*.\textsuperscript{123} *Cook* involved an institutional aid at a residential facility for the mentally handicapped named Bonnie Cook.\textsuperscript{124} Cook had been employed with Mental Health, Retardation, & Hospitals (“MHRH”) from 1978 to 1980 and again from 1981 to 1986.\textsuperscript{125} While employed at MHRH, Cook had a reputation as being an excellent worker who had a spotless record.\textsuperscript{126} Cook reapplied for the same position again in 1988.\textsuperscript{127} At this time, she weighed around 320 pounds.\textsuperscript{128} Even though it was found that her weight would not limit her ability to perform her job, the hospital refused to re-hire her.\textsuperscript{129} The hospital claimed that her weight would prevent her from evacuating patients in case of an emergency and increased her risk of developing a serious ailment.\textsuperscript{130} The hospital also claimed that her obesity would most likely lead to an increase in absenteeism and a likelihood of workers’ compensation claims.\textsuperscript{131}

\textsuperscript{122} *Id.* (“Based on the substantial expansion of the ADA by the ADAAA, Defendant’s assertion that Plaintiff’s weight cannot be considered a disability is misplaced.”).

\textsuperscript{123} 10 F.3d 17 (1st Cir. 1993).

\textsuperscript{124} *Id.* at 20 (“Plaintiff-appellee Bonnie Cook worked at Ladd as an institutional attendant for the mentally retarded (IA-MR) from 1978 to 1980, and again from 1981 to 1986.”).

\textsuperscript{125} *Id.*

\textsuperscript{126} *Id.* (confirming that plaintiff was a model employee who had never been in trouble at work).

\textsuperscript{127} *Id.*

\textsuperscript{128} *Id.* (“In 1988, when plaintiff reapplied for the identical position, she stood 5’2” tall and weighed over 320 pounds.”).

\textsuperscript{129} *Cook*, 10 F.3d at 21.

\textsuperscript{130} *Id.* (“Notwithstanding that plaintiff passed the physical examination, MHRH balked. It claimed that Cook’s morbid obesity compromised her ability to evacuate patients in case of an emergency and put her at greater risk of developing serious ailments.”).

\textsuperscript{131} *Id.* (“We need go no further. In a society that all too often confuses ‘slim’ with ‘beautiful’ or ‘good,’ morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences.”).
The court did not distinguish Cook’s claim as fitting under a particular prong of the ADA, however, it did mention in its opinion that:

The jury could have found that plaintiff, although not handicapped, was treated by MHRH as if she had a physical impairment. Indeed, MHRH’s stated reasons for its refusal to hire—its concern that Cook’s limited mobility impeded her ability to evacuate patients in case of an emergency, and its fear that her condition augured a heightened risk of heart disease, thereby increasing the likelihood of workers’ compensation claims—show conclusively that MHRH treated plaintiff’s obesity as if it actually affected her musculoskeletal and cardiovascular systems.132

Other courts have also found it necessary to protect obese workers from facing discrimination based solely on their weight.133 In EEOC v. Texas Bus Lines,134 the United States District Court of Texas held that an obese employee could be afforded protection under the ADA.135 The plaintiff who was represented by the EEOC was Arazela Manuel, a morbidly obese woman.136 After she had a successful interview, received stellar references, and completed all of the required tests for the position, Texas Bus Lines refused to hire Manuel.137 During Manuel’s physical examination, the administering physician noticed she waddled when she left the room.138 Ultimately, Texas Bus Lines feared that because of this waddle she might not be able to move fast enough to passengers in case there was a serious accident.139 Manuel was disqualified from receiving the position for this reason alone.140

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132 *Id.* at 23 (“The evidence . . . amply supports the jury’s determination that MHRH violated section 504 of the Rehabilitation Act. And because MHRH refused to hire plaintiff due solely to her morbid obesity, there is no cause to disturb either the damage award or the equitable relief granted by the district court.”).
133 *See* Melson v. Chetofield, No. 08-3683, 2009 WL 537457, at *1 (E.D.La. Mar. 4, 2009) (stating employee’s obesity was a disabling impairment under the Americans with Disabilities Act); Greene v. Seminole Elec. Coop., Inc., 701 So. 2d 646 (Fla. Dist. Ct. App. 1997) (holding that employee’s allegations were sufficient to show that employer regarded him as disabled).
135 *Id.* at 965 (holding that employer perceived or regarded applicant as disabled due to her obese condition).
136 *Id.* at 966.
137 *Id.* at 967–68 (“Manuel was interviewed, her references were checked, and she was given, and successfully passed, a road test in a vehicle identical to the one which she would be driving for Texas Bus Lines.”).
138 *Id.* at 978.
139 *Id.* at 967 (“Dr. Frierson concluded that as a morbidly obese woman, Manuel would not be able to move swiftly in the event of an accident.”).
The court specifically held in its ruling that obesity itself is not an actual disability protected by the ADA. The court held that, “[i]f the employer cannot articulate a nondiscriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear or stereotype’ can be drawn.” Thus, the court ruled in favor of Manuel deciding that she fell under the definition of having a disability, which her protection under the ADA, and found that Texas Bus Lines illegally discriminated against her based solely on her weight.

C. Cases Precluding the Obese From Coverage Under Federal Law

In some jurisdictions, overweight workers may not be able to establish that they are protected under the ADA regardless if they are “regarded as” disabled or not. For example, in Walton v. Mental Health Association of Southeastern Pennsylvania, the plaintiff filed a claim under the ADA alleging that she was discriminated against on the basis of her obesity. In Walton’s initial complaint, she failed to specify that her former employer regarded her as disabled. The court of appeals denied her motion to amend her complaint, stating that even if Walton did amend her complaint, the outcome would not change. The court relied on the fact

141 Id. at 975–76 (“[N]either the case law nor the applicable regulations include morbid obesity as a disability under the ADA.”).
142 Id.
143 Id. at 975 (“An individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under the ‘regarded as’ section of the definition of disability whether or not the employer’s perception was shared by others in the field.”).
144 Id. at 982 (“The Court finds that Defendant Texas Bus Lines did discriminate against Ms. Manuel based on its perceived disability of Manuel in violation of the ADA.”).
146 168 F.3d 661 (3d Cir. 1999).
147 Id. at 664.
148 Id.
149 Id. at 665.
that it has never recognized a cause of action against an employer who discriminates against an employee because it perceives the employee as disabled by obesity.\footnote{Id. See generally FED. R. CIV. P. 15 (explaining that when a complaint is not amended within the allotted twenty one days, a party may amend its complaint by way of consent from the court or by the adverse party).}

The most cited to case that claims obesity is not a disability is the case of \textit{EEOC v. Watkins Motor Lines}.\footnote{463 F.3d 436 (6th Cir. 2006).} \textit{Watkins} was decided in 2006 before the most recent amendments to the ADA were enacted.\footnote{Id. at 436.} In \textit{Watkins}, the EEOC brought an action on behalf of a former employee weighing 345 pounds who was discharged after failing to return to work.\footnote{Id. at 437 (“Grindle believed he was discharged because of his weight and so on September 30, 1998, he registered a complaint with the EEOC. On October 30, 2002, the EEOC filed an action in the United States District Court claiming Watkins violated the ADA.”).} The United States Court of Appeals for the Sixth Circuit held that obesity, even morbid obesity, does not constitute a physical impairment unless it is the result of a physiological disorder or condition.\footnote{Id. at 445 (“[W]e hold that to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of a physiological condition.”).} Since the employee did not prove that his disability was caused by a physiological disorder, he could not claim he was disabled according to the definition set forth by the ADA.\footnote{Id. (holding that since Grindle did not show that he suffered from an impairment according to the ADA, the court will not address whether Grindle’s employer perceived Grindle as being substantially limited in a major life activity).}

There is, as of yet, no hard and fast rule to determine whether or not obesity is a disability.\footnote{See Liu, supra note 118, at 156 (“Obesity discrimination in employment cases has been interpreted very differently by courts in the past, highlighting the lack of a consistent view of whether obesity qualifies as a disability and what inquiry is appropriate.”).} It is certain though that if obesity is to be considered a disability, it must fall under one of the three prongs.\footnote{See id. at 145–46 (“The ADAAA’s three elements mirror the three prongs of the ADA in highlighting that each prong identifies a separate way to classify an individual as disabled.”).} Some courts have decided that even if a disability is found according to the three-prong test, the plaintiff’s obesity must be founded on a physiological basis rather than non-physiological basis.\footnote{See id.} These cases are all predicated on the ADA, and since the
ADAAA was passed with the intent of broadening the scope of what constitutes a disability,\textsuperscript{159} people should expect to see a different outcome in these jurisdictions where courts have set such a high burden to prove that obesity is a disability.\textsuperscript{160} This should ultimately lead to an overwhelming acceptance of obesity as a disability under the ADAAA.\textsuperscript{161}

The U.S. Equal Employment Opportunity Commission ("EEOC") has recently declared that obesity should be recognized as a disability according to the ADA.\textsuperscript{162} The EEOC has also implemented guidelines and regulations for interpreting the ADAAA.\textsuperscript{163} These guidelines were purposely implemented to align the ADAAA with Congressional intent for the Act.\textsuperscript{164} "The EEOC’s broad interpretation of disability which reaffirms Congress’s intent for disability protection demonstrates the EEOC’s goal to protect a wider class of individuals."\textsuperscript{165}

IV. How Can Congress Better Protect the Obese From Being Phased Out of the Job Market

What is to stop employers from refusing to hire applicants who are obese?\textsuperscript{166} The United States has long been a place where people are supposed to be treated equally.\textsuperscript{167} It is up to the

\textsuperscript{159} See id.
\textsuperscript{160} See id. at 146.
\textsuperscript{161} See id.
\textsuperscript{162} See Complaint and Jury Demand at 1–6, EEOC v. Res. for Human Dev., No. 10-03322 (E.D. La. Sept. 30, 2010), WL 3841066; see also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/index.cfm (last visited Sept. 28, 2011). The EEOC is an independent commission that is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex, disability or genetic information. Id. The commission adopts rules for processing complaints, interpretative guidelines, policy statements, statistical reporting, and record keeping requirements. Id. An employee that has fallen victim to discrimination in the workplace can file a charge alleging discrimination to one of its district offices, which will conduct an investigation and undertake, if it finds discriminatory behaviors, the conciliation of the parties. Id. If this administrative procedure of conciliation fails, the EEOC can file a suit in the court on behalf of the victim. Id.
\textsuperscript{163} Liu, supra note 118, at 151 ("[T]he EEOC has released guidelines and regulations providing information on how to interpret specific terms. The EEOC . . . voted . . . to revise its regulations to conform to changes made through the ADAAA. These regulations focus on ‘putting [the protections] back to where Congress intended when the ADA was enacted in 1990.’").
\textsuperscript{164} Id. at 152 (allowing individuals to bring a claim under the ADA as in accord with congress’s intent of making this right available to all who are disabled).
\textsuperscript{165} Id.
\textsuperscript{166} See supra Part I.
current generation to demand equal treatment for all. The problem of discrimination against
the obese is too complicated to be solved by one approach. Therefore, the only successful
solution is one that incorporates safeguards at every step of the employment process. Such a
solution must address how each area of employment can be improved so that no applicant feels
like he or she has been discriminated against because of his or her weight.

A. During the Hiring Process

When it comes to the rejected applicant who happens to be obese, he or she often has a
pretty good idea of why he or she was not selected for the job. In the search for a job, obese
applicants with similar or identical credentials are less likely to be hired than thin applicants.
Obese candidates are stereotyped as being less competent, unproductive, indecisive,
unorganized, and unmotivated.

No matter how much society progresses in its positive and more tolerant outlook upon the
disabled, there will still be people who treat overweight individuals differently. If society
wants people who are obese to feel welcome to the same opportunities as those who are not
obese, Congress must implement an affirmative action program. Affirmative action is the
treatment of a group of people that differs from the treatment of the general population, intended

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act is to provide appropriate remedies for individuals who are intentionally discriminated against and have been the
victim of unlawful harassment in the workplace).
168 See infra Part IV.A–C.
169 See supra Part III.A–B.
170 See infra Part IV.A–C.
171 See infra Part IV.A–C.
172 See Korn, supra note 15, at 225 (“[F]at people have a harder time getting a job. Between equally qualified
candidates, the overweight applicant will be perceived as being less qualified, having poorer work habits, and are
more likely to be absent.”).
174 Id.
175 See supra Part II.A–B.
176 See infra text accompanying notes 176–79.
to improve that group’s chances of obtaining a particular goal or opportunity.\footnote{177}{See Appelt, supra note 95. Examples of Affirmative Action include: 1. Preferential employment, including recruitment, hiring and promotion; 2. Preferential schooling, including college and university recruitment and admissions; 3. Special programs for women and/or minorities designed to better educate students and train workers; 4. ‘set-aside’ programs, reserving a percentage of business opportunities for women and/ or minorities; 5. Political empowerment measures, including efforts to create political districts in which a majority of the eligible voters are racial minority group members capable of electing minority candidates to state, local and federal offices.\textit{Id.}} Affirmative action has been a remedy for solving such inequalities that are detrimental to the well being of society for almost one hundred years.\footnote{178}{See International Convention of the Elimination of All Forms of Racial Discrimination, supra note 95; Appelt, supra note 95.} Some of the benefits of affirmative action include: promoting economic opportunity for minority groups, erasing subordination based on difference, neutralizing the competitive advantages that classes of people enjoy in business and employment, and acknowledging society’s cultural diversity.\footnote{179}{See Appelt, supra note 95. Examples of Affirmative Action Initiatives include: 1. “The other things being equal rule” when there are two candidates, one female or minority and the other male or white, and both are equally qualified on should choose the woman or minority. 2. “The high threshold of qualification rule” among a pool of candidates who far surpass the minimum level of competence, choose the woman or minority candidate over the non minority even if the latter has marginally better qualifications. 3. “The minimum threshold qualification rule” among a pool of candidates, who meet the minimum level of competence, hire the minority over the non-minority even if the latter has significantly better qualifications. 4. “Tokenism” ensure that at least one minority member is selected. 5. “Proportionality to the recruitment pool” if minority are only 20% of the total population of qualified applications then aim to fill 20% of the population with minorities. 6. “Proportionality to the total population” if minorities make up 25% of population than 25% of work force should be that way.\textit{Id.}} Affirmative action in hiring obese individuals could end the unfair advantage that skinnier applicants enjoy.\footnote{180}{See infra Part II.A–B.}

Another solution aimed at preventing employers from discriminating against obese applicants would be to provide tax incentives for companies who hire obese applicants.\footnote{181}{See \textit{Hiring People With Disabilities}, U.S. SMALL BUS. ADMIN., http://www.sba.gov/content/hiring-people-with-disabilities (last visited Oct. 13, 2011).} While offering tax incentives might be similar to mandating affirmative action, tax incentives have the advantage of providing an economic incentive to not discriminate based solely on an applicants
weight. Currently there is an ADA small business tax credit for which businesses can qualify.\(^{182}\) If a small business hires an individual with a disability, that business can receive a tax credit for any money spent on accommodations for the disabled employee.\(^{183}\) This tax incentive should be expanded to cover employers who hire individuals who are obese.\(^{184}\) Unless obesity is listed as a disability under a new amendment to the ADA, it is very unlikely that an employer could claim an employee’s obesity should constitute a disability worthy of a tax credit.\(^{185}\)

**B. During an Obese Individual’s Employment**

Obese employees are more likely to face discrimination after they are hired.\(^{186}\) Obese employees can face several types of discrimination at the workplace.\(^{187}\) Furthermore, obese employees are also more likely to be harassed by fellow employees.\(^{188}\) Besides being harassed by fellow employees at the office, obese people also face wage discrimination.\(^{189}\)

Despite the current trend of commercials on television advocating, “quick weight loss now,” and the subliminal messages in the media telling viewers that, “skinny is better,” there has

\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) See supra Part IV.A.

\(^{185}\) See supra Part IV.C.

\(^{186}\) See, e.g., CLINICAL OBESITY IN ADULTS AND CHILDREN 28 (Peter G. Kopelman et al. eds., 3d ed. 2010) (analyzing research that shows that negative stereotypes about obese employees are common and can lead to inaccurate perceptions about obese employees level of performance which in turn fosters an environment where obese employees are more likely to be discriminated against); YALE RUDD CTR., WEIGHT BIAS: A SOCIAL JUSTICE ISSUE 4 (2009) (showing that many employers hold negative stereotypes about fat employees which contribute to discrimination in the workplace).

\(^{187}\) See Butterfield v. New York State, No. 96 Civ.5144(BDP)’LMS, 1998 WL 401533, at *4–5 (S.D.N.Y. July 15, 1998) (stating that the constant harassment by fellow employees such as posting drawings of obese character which resembled plaintiff, poisoning plaintiffs food, spraying cheez wiz on plaintiffs locker, and constant phones calls where the sound of throwing up was heard, created a hostile work environment); Greene v. Seminole Elec. Coop., 701 So. 2d 646, 648 (Fla. Dist. Ct. App. 1997) (describing plaintiffs constant harassment for being obese such as being made fun of on a regular basis, being told to go on a diet, and receiving constant threats of demotion if weight was not lost); see, e.g., Elizabeth Kristen, Comment, Addressing the Problem of Weight Discrimination in Employment, 90 CAL. L. REV. 57, 62 (2002) (Obese employees are less likely to be promoted, and are more likely to be transferred to positions which require minimal contact with clients).

\(^{188}\) See id. at 62.

\(^{189}\) See, e.g., Charles L. Baum II & William F. Ford, The Wage Effects of Obesity: A Longitudinal Study, 13 HEALTH ECON. 885, 897 (2004) (finding wage disparities among both men and women); Kristen, supra note 187, at 64 (analyzing a study which shows that obese women earn up to twenty four percent less than thin women).
been a size-acceptance movement growing in the United States.\textsuperscript{190} The National Association to Advance Fat Acceptance (“NAAFA”) was founded for the sole purpose of counterprogramming by letting people know it is ok to be big.\textsuperscript{191} NAAFA believes in the power of education to eradicate the discrimination most obese people face on a day-to-day basis.\textsuperscript{192}

The more the public is informed about something, people have less of a tendency to fear it.\textsuperscript{193} If employers become more aware of the false stereotypes that obese workers have to face on a constant basis, society might see less and less employees being evaluated based on what the numbers on the scale read. This would ultimately lead to a more welcoming workplace for the obese employee. As a part of this education, each employer should have a human resources department and administrative procedure in place so the aggrieved employee turn to someone anonymously and file a complaint if an employee feels like he or she is being discriminated against due to his or her obesity. Not only will such a solution protect the employee, it will also protect the employer from being opened up to lawsuits for inadvertent discriminatory practices.

C. During the Firing Process

At 600 pounds, Ronald Krantz could no longer fasten his seatbelt.\textsuperscript{194} When Ronald Krantz asked for a seatbelt extender so he could operate his forklift, his employer, BAE systems responded by firing him.\textsuperscript{195} The EEOC has recently filed a suit alleging that BAE violated

\textsuperscript{191} Id.
\textsuperscript{192} Id. Suggesting a kit of tools each company should have to help educate its employees. Id. These tools would include real life examples of weight discrimination, industry leading commentary, and interactive business scenarios with follow up questions for discussion. Id.
\textsuperscript{195} Id.
federal disability laws when it fired Ronald.\textsuperscript{196} By no means does any employer want to absorb the costs that come with a lawsuit, and Ronald Krantz is by no means wealthy enough that he can afford to be without a job.\textsuperscript{197} BAE is between a rock and a hard place; how can such a situation be avoided?\textsuperscript{198}

Congress needs to pass another amendment to the ADA expressly stating its legislative intent that obesity is a disability. Once Congress declares obesity to be a disability, employers and employees alike will know what their rights are. Such a solution has already been employed by certain state and city legislatures around the nation.\textsuperscript{199} In Michigan it is illegal to discriminate against someone based on how much they weigh.\textsuperscript{200} Critics of the law believe that the only hurdle in implementing a federal law banning discrimination against people who are overweight is that it will generate more lawsuits in the workplace.\textsuperscript{201} This is not the case. Michigan’s antidiscrimination law has been in place for over thirty years with very few resulting lawsuits.\textsuperscript{202} Because the problem of obesity is so pervasive, it cannot be left up to local legislatures to pass similar laws to Michigan’s.\textsuperscript{203} What the passing of a new amendment to the ADA would do is ensure that no one throughout the entire country, no matter what he or she weighs, will have to feel like they have no recourse for discrimination based on their weight. If the ADAAA specifically states that obesity is a disability, then BAE could have tried to accommodate Krantz

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\textsuperscript{196} Id.
\textsuperscript{197} See id.
\textsuperscript{198} See infra Part IV.A–C.
\textsuperscript{199} See YALE RUDD CTR., supra note 186, at 7 (recognizing Michigan’s state law prohibiting discrimination along with the cities of San Fransico, Santa Cruz, and the District of Columbia).
\textsuperscript{200} Mich. Comp. Laws § 37.2102 (1982). Michigan’s law states:
The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.
\textsuperscript{201} See YALE RUDD CTR., supra note 186, at 8.
\textsuperscript{202} Id.
\textsuperscript{203} See supra note 90 and accompanying text.
\end{flushright}
instead of firing him. Not only would Robert Krantz still have a job, employers would know whether or not they can fire without fear of retaliation.

**Conclusion**

“Protecting the rights of even the least individual among us is basically the only excuse the government has for even existing.”\(^{204}\) The passing of the Rehabilitation Act of 1973 was a monumental event in delivering equal rights to the disabled.\(^{205}\) The enactment of the ADA took the nation another step forward in providing further protecting disabled Americans.\(^{206}\) Congress reassured the disabled that they have a voice with the passing of the ADAAA.\(^{207}\) It is now time for Congress to act again and fulfill its promise to afford every disabled individual the right to equal treatment by declaring the obesity as a disability. Society has a moral obligation to protect victims of weight discrimination, and the current efforts to fit weight discrimination under current antidiscrimination laws are failing.\(^{208}\) People who are obese still have no clear path to establish that they are disabled.\(^{209}\) The time for change is well overdue.

Unfortunately, even with the ADAAA, overweight people currently have little or no recourse when it comes to being denied equal treatment.\(^{210}\) This problem is so specific that the enactment of federal and state laws will not be enough. The only viable solution is a systematic approach, which ensures there are safeguards at every level of the employment process, from


\(^{205}\) See supra Part I.A.

\(^{206}\) See supra Part I.C.

\(^{207}\) See supra Part I.C.

\(^{208}\) See Yale Rudd Ctr., *supra* note 186, at 9 (“Real Change Will Require Compassion and a Clear Method of Defending Basic Human Rights.”).

\(^{209}\) See supra Part III.B–C.

\(^{210}\) See supra Part III.B–C.
hiring to workplace treatment to termination. Only then can the overweight applicant be given the same chance in obtaining and retaining employment as equals.

211 See supra Part IV.A–C.